inflicted the injuries; the vital question to be decided is whether for some reason or other the killing is wholly excusable or amounts to something less than murder. Here, generally, the question is not whether it falls or does not fall within the substantive portion of section 300, but whether it falls within one or other of the special exceptions set out later in that section.

And that brings me to the main reason for which we considered the summing-up in the present case was unsatisfactory in the case of the first appellant. It is true that the actual defence put forward and relied on at the time was that the killing was an accident. If that was accepted that was the end of the matter and he was entitled to be acquitted. But if it was not accepted it by no means followed that the killing amounted to murder. In the event the trial Judge put the matter to the jury as a case of murder or nothing and in our opinion in doing so he was wrong.

Without going into detail it is clear there were several possible ways in which the evidence might have been viewed. It could have been regarded as making out a deliberate lying in wait followed by a deliberate killing and in that case, of course, the appellant was guilty of murder. On the other hand, it could have been, though perhaps with difficulty, regarded in the light of the submission of counsel for the defence as something which had happened accidentally and in that case there was no offence committed at all. It could also, however, have been regarded in such a way as to make out a case of manslaughter either because the appellant had been defending himself against attack but had gone beyond the limits of the right of private defence or because a sudden fight had arisen and the appellant had killed the deceased without premeditation and without having taken undue advantage or acted in a cruel or unusual manner.

In our view those possible defences that the killing was something less than murder though still culpable should have been left to the jury even though they were not relied on by defending counsel. As was said by Lord Reading C.J., in the case of *R.* v. *Hopper* [3]:—

> "Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself."

This rule was approved by the House of Lords in *Mancini* v. *Director of Public Prosecutions* [4] and the reason for it was thus stated by Lord Goddard in the case of *Kwaku Mensah* v. *The King* [5]:—

> "The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the Judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the Judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder."

We were unable to say what course the jury would have taken in the case of the first appellant had they been properly directed. In the circumstances we thought it proper to set aside the conviction for murder and substitute for it a conviction for culpable homicide not amounting to murder and to impose what we considered a suitable sentence.

In the case of the second appellant the trial Judge did leave the question of culpable homicide not amounting to murder to the jury and the jury brought in a verdict of guilty of that offence. In his case such minor errors as there were in the summing-up were errors in favour of the defence and we saw no reason to interfere with either the conviction or the sentence.

Order accordingly.

Solicitors: *Shook Lin & Bok; P. T. Wong & Co.*

JUBRI v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) October 16, 1961]

[K.L. — F.M. Criminal Appeal No. 20 of 1961]

Evidence — Circumstantial evidence — Securing conviction on.

The appellant was convicted for murder of a woman and sentenced to death. The prosecution case was supported by circumstantial evidence showing that (a) the appellant was on visiting terms with the deceased and must have known that she was a woman of some substance; (b) shortly before the killing the appellant had been short of money; (c) appellant had ten days before the killing proposed to a prosecution witness to rob the deceased and (d) there was no evidence to support the appellant's contention that he was alone at his house on the day in question. On appeal,

Held: in order to secure a conviction on circumstantial evidence, the evidence must be such that if it is believed, there is no reasonable alternative to the guilt of the accused. Having regard to the evidence, the verdict of the jury cannot be supported in this case. *Kartar Singh & Anor.* v. *R.* [2] followed.

Cases referred to:—

(1) *Wallace* 23 Cr. A.R. 32, 35.

(2) *Kartar Singh & Anor.* v. *R.* [1952] M.L.J. 85, 86.

COURT OF APPEAL.

S. Y. Chan for the appellant.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appellant was convicted for murder at the Muar Assizes and sentenced to death. He appealed against his conviction and in the event we set it aside on 16th August, 1961.

The charge against the appellant was that during the night of 27th/28th March, 1961, at Parit Puasa near Batu Pahat he murdered a woman Andai binti Kardi.

The deceased was a woman of some substance who had a rubber estate at Parit Puasa and lived there alone. On the morning of 28th March she was found dead on the floor of her house. She had been practically decapitated and there were numerous incised wounds on her body which suggested she had defended herself with considerable vigour against an assailant armed with a sharp instrument. A cupboard in her bedroom had been ransacked but there was no evidence one way or the other to show whether anything was missing.

It was the prosecution case that the appellant had killed the deceased and it was sought to be supported by a certain amount of circumstantial evidence.

In the first place the appellant was on visiting terms with the deceased and must have been aware that she was a woman of some substance.

In the second place, shortly before the killing the appellant had been short of money. There is nothing to show that he was seriously embarrassed financially but he had had to borrow a sum of about $85 to pay the quit rent on his land and he was having difficulty in raising money to buy musical instruments for some sort of orchestra in which he was interested.

Then one Awang, who it is to be observed had been prosecuted for murder in 1957 but acquitted on the ground of insanity, said that about ten days before the killing the appellant had approached him and said he was heavily indebted and had no money to buy clothing for his wife and he proposed to find the money by robbing the deceased and he suggested that this witness should join him. The witness naturally declared that he had declined this invitation. Another witness named Ahmad, a boy of nineteen, said that the appellant had also extended to him an invitation which he declined to assist in robbing the deceased.

Finally, it was urged that there was no evidence to support the appellant's own assertion that he was alone in his own house on the night of the killing although his wife was staying with her mother.

The case was summed up to the jury with considerable care. It was pointed out to them that the evidence against the appellant was purely circumstantial and they were told that before they could convict on circumstantial evidence such evidence "must rule out any other reasonable possibility before you can accept it as sufficient evidence upon which you may find him guilty." The jury, however, brought in a majority verdict of guilty with which the Judge agreed and the appellant was accordingly convicted.

We gave the evidence in the case our most careful and anxious consideration and in the event we were forced to the conclusion that having regard to the evidence the verdict of the jury could not be supported. If it were true the prosecution evidence certainly afforded grounds for very grave suspicion. The evidence of the witnesses Awang and Ahmad, if it was believed and that was a question for the jury, shewed that the appellant had expressed an intention of robbing the deceased shortly before she was in fact killed by someone whose motive was probably robbery. There was evidence, too, that the appellant at the material time was to some extent in need of money and that shortly after the killing he was in a position to pay off a small debt. There was not, however, a scrap of evidence to show that he was anywhere near the house of the deceased at any material time. There was not a scrap of evidence to shew that anything belonging to the deceased could be traced to him nor indeed that anything belonging to the deceased was missing from her house. The photographs in evidence and the medical evidence shew that the deceased put up a vigorous struggle for her life and that there was considerable effusion of blood all over the room where the killing took place yet there was not a scrap of evidence of any trace of blood being found elsewhere.

In our view then, as was said by Lord Hewart C.J. in the case of *Wallace* [1], "the case against the appellant.....was not proved with that certainty which is necessary in order to justify a verdict of guilty."

Perhaps it is unfortunate that the trial Judge did not direct the jury to return a verdict of not guilty at the close of the case for the prosecution although it must be remembered that he was not asked to do so by counsel. Nevertheless, in our view, the verdict could not stand.

Before departing from the case we would repeat the words of Murray-Aynsley C.J. in the case of *Kartar Singh & Anor.* v. *Rex* [2]:—

> " Where there is direct evidence, however, slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all."

Appeal allowed.

KOK HOONG v. LEONG CHEONG KWENG MINES LTD.

[O.C.J. (Ong J.) October 19, 1961]

[K.L. — Civil Suit No. 178 of 1956]

Practice and Procedure — Estoppel per rem judicatam — Judgment by default — Whether defendant estopped in subsequent action on same hiring agreement from disputing validity of agreement — R.S.C., O.25 r.2 — Civil Procedure Code (Cap. 7), Ch. xxxix.

Within the limits laid down by Lord Maugham and Lord Wright in the case of *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [3], a judgment by default is as good as any other to raise an estoppel.

A defendant against whom a default judgment had previously been entered for arrears of rent of machinery